

External Regulation in motion – A snapshot

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Introduction

The need for an effective and robust *regulatory model* for processing and investigating complaints, and on finding of *unsatisfactory or unprofessional misconduct* and disciplining legal practitioners, cannot be overemphasized for the South Pacific region. In 2011¹, with the advent of the South Pacific Lawyers Association [SPLA], the peak legal professional institution for the region, member law societies and bar associations congregated to reach out, to rewrite the rulebook for raising the bar for the legal profession in the region.²

In the session for the *Regulation and Discipline of the Legal Profession*, at the inaugural South Pacific Lawyers' Conference held in Port Vila–Vanuatu on 14-15 November 2013, I considered the available regulatory models for the legal profession, with particular focus on Fiji's *external disciplinary model*, interchangeably referred in some text as *fully independent regulatory model* or *independent regulator*.³ The research methodology for my preliminary study utilised mixed methods.⁴ Except for Fiji, none of the other member countries' disciplinary model in the region was analysed, which formed a limitation of my study. During this session, representatives from Vanuatu, Papua New Guinea and Solomon Islands also described the regulatory framework and existing disciplinary processes of their

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¹ South Pacific Lawyers Association, 'In Brief...Preparing for take-off' (2011) 1 *newSPLAsh* 12
<http://www.southpacificlawyers.org/files/uploads/newSPLAsh%20Issue%201%20%28web%29.pdf> (Accessed 27/11/13)

² See above, 13; See also Ross Ray, 'Introducing newSPLAsh Ross Ray QC, Chair, South Pacific Lawyers' Association Steering Committee' (2011) 1 *newSPLAsh* 2
<http://www.southpacificlawyers.org/files/uploads/newSPLAsh%20Issue%201%20%28web%29.pdf> (Accessed 27/11/13);

South Pacific Lawyers Association, 'In depth...Introducing: SPLA's Legal Education Committee' (2011) 3 *newSPLAsh* 5
http://www.southpacificlawyers.org/files/uploads/018CLA_newSPLAsh_FA_WEB.pdf (Accessed 27/11/13)

³ Tauvasa T Chou-Lee, 'In Depth...Regulating the Legal Profession' (2013) 7 *newSPLAsh* 13
http://www.southpacificlawyers.org/files/uploads/newSPLAsh%20Issue%207_FINAL.pdf (Accessed 27/11/13); See also South Pacific Lawyers Association, *Needs Evaluation Survey for South Pacific Lawyer Associations*, Final Report (2011) 6
<http://www.southpacificlawyers.org/files/uploads/2011%2010%2018%20-%20Needs%20Evaluation%20Survey%20Final%20Report.pdf> (Accessed 27/11/13)

⁴ Barbara M Grant and Lynne S Giddings, 'Making sense of methodologies: A paradigm framework for the novice researcher' (2002) 13(1) *Contemporary Nurse* 18

respective professional associations.⁵ The overall impression that became noticeable in relation to the disciplinary response to breaches by practitioners in these respective jurisdictions, in my view, can best be expressed as *low confidence*, an expression commonly used in climate change reports.⁶

My preliminary study relied on a number of *professional disciplinary proceedings* presided by the *Commissioner of the Independent Legal Services Commission [ILSC]* under the *external disciplinary model* in Fiji since 2009.⁷ I further considered the range of *Orders* made against practitioners in Fiji for *unsatisfactory professional conduct and professional misconduct*. With the promulgation of the *Legal Practitioners Decree 2009*⁸ [LPD], section 84 establishes the ILSC, that takes carriage of disciplining legal practitioners when found in breach of the provisions of the LPD or any other *written law* such as the *Trust Accounts Act*, *High Court Rules* to name a few. The *external regulation* of the profession in Fiji, takes queue from the *New South Wales* framework for regulating lawyers and enforcing professional ethical standards.⁹

Overview of regulatory framework under LPD

Any person can lodge a complaint to the Chief Registrar of the High Court¹⁰ and where the Attorney-General or the Fiji Law Society receives complaints, it can also be referred to the Chief Registrar.¹¹ Upon finding of *unsatisfactory or unprofessional misconduct* by the ILSC, the *Order* of the ILSC is filed with the High Court within

⁵ South Pacific Lawyers Association, 'In Depth...South Pacific Lawyers Conference Program' (2013) 8 *newSPLash* 13

http://www.southpacificlawyers.org/files/uploads/newSPLash%20Issue%208_FINAL%20WEB.pdf

⁶ The IPCC Uncertainty Guidance Note – IPCC AR4: Climate Change 2007 Technical Summary Changes in Human and Natural Drivers of

Climate http://www.ipcc.ch/publications_and_data/ar4/wg1/en/tssts-2.html (Accessed 28/11/13)

⁷ *Legal Practitioners Decree 2009 (Fiji)* – sections 84(2), 85(1) http://www.paclii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 27/11/13)

⁸ See above, section 184(1) repeals *Legal Practitioners Act 1997 (Fiji)*

⁹ NSW Law Reform Commission, *Scrutiny of the legal profession: Complaints against Lawyers*, Report No 70 (1993) 71-129

http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_70.pdf (Accessed 27/11/13); See also Office of the Legal

Services Commissioner http://www.olsc.nsw.gov.au/olsc/lsc_index.html (Accessed 27/11/13); See also *Administrative Decisions Tribunal Act*

1997 No 76 <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+76+1997+cd+0+N> (Accessed 27/11/13)

¹⁰ *Legal Practitioners Decree 2009 (Fiji)* – section 99 http://www.paclii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 27/11/13)

¹¹ *Legal Practitioners Decree 2009 (Fiji)* – section 102 http://www.paclii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 27/11/13)

fourteen days, making it an *Order* of the High Court.¹² Finally, appeal mechanisms pursuant to the *Appeal Rules* are also available to a legal practitioner to pursue in the appellate courts.¹³

In view of the diverse disciplinary models, the finding of my study informs professional associations in the region, to assess their existing disciplinary apparatus with a view to continue lifting public confidence and setting high standards of professional ethics for the profession.

Professional disciplinary cases

My preliminary findings with respect to *professional disciplinary proceedings* reveal that routine ‘conveyancing transactions and irregularities in professional trust account’ to name a few, are rich areas for complaints against practitioners in Fiji.¹⁴ In ***Chief Registrar v Vipul Mishra, Mehboob Raza, Muhammad Shamsud-Dean Sahu Khan and Sahu Khan & Sahu Khan***,¹⁵ the then Commissioner (formerly Justice) John Connors, at paragraph 1, remarked, “*This litany of disaster commenced with what should have been a routine conveyancing transaction. It is difficult to conceive that an innocent member of the community could be treated in the way this complaint was by a brace of senior lawyers*”.¹⁶

Commissioner Connors sent a clear message expressing:

*“In a country such as Fiji where the literacy and understanding is not as high as in developed countries the position held by a legal practitioner is even more special and the responsibilities are even greater...It follows from to the authorities that the seniority and notoriety of the 3rd Respondent exacerbates the conduct and does not mitigate it...the public must be protected from conduct of the type displayed by the 3rd Respondent...”*¹⁷

¹² *Legal Practitioners Decree 2009 (Fiji)* – section 122(2) http://www.pacii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 27/11/13); See also Mediation Conference s109(1)(b) *Legal Practitioners Decree 2009 (Fiji)* http://www.pacii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 5/12/13)

¹³ *Chief Registrar v Abhay Singh Independent Legal Services Commission No 1 of 2009 [Judgment]* (25 Jan 2010); See also *Abhay Kumar Singh v Chief Registrar of the High Court No 3 of 2010 Court of Appeal of Fiji [Judgment]* (22 Sept 2010); *Abhay Kumar Singh v*

Chief Registrar of the High Court of Fiji No 7 of 2010 Supreme Court of Fiji [Judgment] (20 Oct 2011);

¹⁴ *Chief Registrar v Vipul Mishra, Mehboob Raza, Muhammad Shamsud-Dean Sahu Khan, Sahu Khan & Sahu Khan Independent Legal Services*

Commission No 2 of 2010 [Judgment] (3 Mar 2011); *Chief Registrar v Divendra Prasad Independent Legal Services Commission No 3 of 2011 [Sentence]* (7 Mar 2012)

¹⁵ See above

¹⁶ See above n 14, para 1

¹⁷ *Chief Registrar v Vipul Mishra, Mehboob Raza, Muhammad Shamsud-Dean Sahu Khan, Sahu Khan & Sahu Khan Independent Legal Services*

Likewise, 'failure to respond', disciplinary cases have also surfaced lately, that has led the ILSC to remind practitioners of ensuring their duty to maintain high ethical standards in their practice and to equally treat or take the regulatory body for practitioners in Fiji seriously. Commissioner (formerly Justice) Paul Madigan, in his ruling in **Chief Registrar v John Rabuku**, in what I find as three step cautionary remainder to practitioners, Commissioner Madigan stressed that:

"failure to respond to the Registrar (Chief Registrar of the High Court) is not only in direct contravention to the stipulation in section 105 (Registrar may require explanation) of the Legal Practitioners' Decree but it is also showing complete disdain and disregard for the authority of the regulatory arm of the profession. Should such practice go unchecked then the profession would become totally unmanageable with the public then being protected and the spirit of the legislation defeated

and later,

The Commission regards non-compliance with the Chief Registrar's requests and demands are very serious failures on the part of the practitioner. If a practitioner cannot regulate his/her own affairs, how can he regulate the affairs of his clients?

and still later,

To defy authority and in doing so to contravene the provisions of Division 3 of the Legal Practitioners' Decree 2009, calls into question the practitioners' suitability to be in practice. In its role of guardian of professional standards, the Commission has no option but to suspend the Respondent's right to practise".¹⁸

This clearly demonstrates the gravity of non-compliance with the legislative duty stipulated in the LPD.

Other areas for complaints cannot be omitted and these are visible in (no particular order):

- deceptive advertising;¹⁹
- signing, affixing and witnessing Commissioner for Oaths stamp without a valid practising certificate;²⁰

¹⁸ Commission No 2 of 2010 [Judgment on Sentence – 3rd Respondent] (4 May 2011) paras 25, 48, 49, 50
¹⁹ Chief Registrar v John Rabuku Independent Legal Services No 13 of 2013 [Judgment and Sentence] (30 Jul 2013) para 4
²⁰ Chief Registrar v Mohammed Azeem Ud-Dean Sahu Khan Independent Legal Services No 16 of 2013 [Judgment and Sentence] (30 Jul 2013)

- making appearances in Court without a valid practising certificate;²¹
- providing instructions to appear without a valid practising certificate;²²
- raising voice in Court and showing disrespect to the bench;²³ and
- attacking the reputation of opposing client.²⁴

Orders

The gravity of offending in these areas cannot go unnoticed also, as it attaches severe penalties as stipulated in *section 121* of the *LPD*. Penalties from a few of the disciplinary cases are illustrated as follows:

a. *'failure to respond'*

The penalty imposed by the Commission includes: public reprimand; fine; and suspension from practice ranging from one to three months. The gravity of offending is treated as professional misconduct. In the most recent *failure to respond* case, **Chief Registrar v Anand Singh**, the Commission exercised its powers pursuant to *section 121* of the *LPD* to impose penalties, and it was in this ruling that the Commissioner announced that:

"Previous decisions of this Commission have established a 'tariff' for this dereliction of legislative duty (sections 104, 105, 108); that being suspension of practice from one to three months. In [Matter No 14 of 2013,] a one month suspension was ordered for a practitioner who admitted his failing from the very beginning and was most remorseful before the Commission. In [Matter No 13 of 2013] the practitioner displayed a total lack of remorse and offered an excuse to the Commission that was not only unreasonable but which was arrogantly disdainful of his own client. His certificate was suspended for a period of three months".²⁵

b. *'practising without a valid practising certificate'*

²⁰ *Chief Registrar v Kelera Baleisuva Buatoka Independent Legal Services No 20 of 2013 [Judgment] (11 Oct 2013)*

²¹ *Chief Registrar v Siteri Adidreu Cevalawa Independent Legal Services No 6 of 2011 [Extempore Ruling on Sentence] (5 Dec 2011)*

²² *Chief Registrar v Adi Kolora Naliva Independent Legal Services No 4 of 2011 [Extempore Judgment] (5 Dec 2011); See also Chief Registrar v Kini*

Marawai and Marawai Law Independent Legal Services No 6 of 2012 [Judgment and Sentence] (15 May 2013)

²³ *See also Chief Registrar v Alena Koroi Independent Legal Services No 5 of 2011 [Sentence] (14 Mar 2012); See also Chief Registrar v Amrit Sen*

Independent Legal Services No 10 of 2013 [Judgment] (6 Nov 2013)

²⁴ *See also Chief Registrar v Savenaca Komaisavai Independent Legal Services No 21 of 2013 [Judgment] (8 Oct 2013)*

²⁵ *Chief Registrar v Anand Singh Independent Legal Services No 24 of 2013 [Judgment] (7 Nov 2013) para 33*

The pattern of penalty varies as each case turns on its own peculiar circumstances, thus such conduct is treated as professional misconduct or unsatisfactory professional conduct. In **Chief Registrar v Niko Nawaikula and Savenaca Komaisavai**, the Commissioner in publicly reprimanding both respondents, fining the 1st Respondent FJ\$2,000, and suspending the practising certificate of the 2nd Respondent for three months, stressed that:

“In a situation where an unlicensed practitioner is wanting to operate under the ‘umbrella’ of a licensed practitioner almost invariably he or she will be ‘freelance’ and not in situ in the licensing practitioner’s office and he or she will therefore be beyond the influence and control of the licensing practitioner thereby creating the probability of unchecked disorder. The provisions of the LPD (and particularly the provisions relating to licensing) exist to bring order and control over the practice of the profession and the conduct of the individual practitioners and any deviation from this or disregard to the strict provisions will lead to professional anarchy”.²⁶

Making appearances without a valid practising certificate before the Bench, is in effect a strict liability offence, and the provisions on the LPD, expands further to making such offending as a criminal offence, with a maximum penalty of FJ\$5,000 and imprisonment for one year for subsequent offending.²⁷

c. ‘repeat offending and borderline case of dishonesty’

Regrettably, these cases will cause the Commission to strike off the practitioner from the Roll of Practitioners. In **Chief Registrar v Kini Marawai and Rajendra Chaudhry**, the Commission summarized:

“Striking off is a sanction reserved for repeated misconduct or a pattern of misconduct calling into question the practitioner’s ability to ever be fit and proper: suspension is to be reserved for conduct that is isolated, caused by illness or unsoundness of mind, conduct that is explicable by its own circumstances and which will not necessarily occur again”.²⁸

d. ‘trust account irregularities’

²⁶ *Chief Registrar v Niko Nawaikula and Savenaca Komaisavai Independent Legal Services No 9 of 2012 [Judgment and Sentence]* (12 Apr 2013) para 22

²⁷ *Legal Practitioners Decree 2009 (Fiji) – section 52 (2)* http://www.pacii.org/fj/promu/promu_dec/lpd2009220/ (Accessed 27/11/13); See also

Chief Registrar v Laisa Lagilevu Independent Legal Services No 1 of 2012 [Decision] (16 Mar 2012) para 3

²⁸ *Chief Registrar v Kini Marawai and Rajendra Chaudhry Independent Legal Services No 2 of 2012 [Sentence]* (5 Oct 2012) para 21

Failing to accurately administer professional trust account records often appear as one-off conduct or are compounded by other offending, in which case the Commission will typically make a finding of conduct as professional misconduct or unsatisfactory professional conduct. In ***Chief Registrar v Haroon Ali Shah***, the Commissioner in striking the name of the respondent off the Roll, fining and imposing payment of witness expenses and wasted costs stated:

“Trust account abuse is probably the most serious departure from the professional duties a practitioner owes to the public. The very purpose of a solicitor’s trust account is to protect a client’s fund and to ensure that those funds are kept safe and applied to the purpose for which they were entrusted to the practitioner. Any departure from those purposes is very serious indeed and a defalcating practitioner must be visited with penalties of the severest degree. Protection of the public must be the paramount consideration over and above the livelihood and freedom of practice of any practitioner”.²⁹

Conclusion

A snapshot of the *external disciplinary model* in Fiji, shows *high confidence* in setting and maintaining high standards of professional ethics and practice for practitioners in Fiji. This emerging model has given renewed impetus to public confidence. *Self-regulation*, which is the more widely existing model used to date amongst member law societies and bar associations in the region, offers divided response in terms of regulating the profession and disciplining lawyers effectively. Retaining or shifting from self-regulation rests with the people of the profession who practise in it, and who are positioned uniquely in the region to strengthening or shifting the pole to resurrecting community confidence in the profession.

²⁹ *Chief Registrar v Haroon Ali Shah Independent Legal Services No 7 of 2012 [Sentence] (22 Jun 2012) para 37*

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